KUANTAN KUALA LUMPUR EXPRESS OMNIBUS CO. LTD. v. UTAMA EXPRESS SDN. BHD.

[O.C.J. (Wan Hamzah S.C.J.) May 6, 1985]
[Kuala Lumpur – Civil Suit No. A5 of 1983]

Franchise – Interference or disturbance of a right or franchise – Application for injunction and interlocutory injunction – Serious issues to be tried – Balance of convenience in favour of grant of interlocutory injunction.

Tort – Right or franchise – Interference or disturbance of – Miscellaneous torts – Injunction.

Practice and Procedure – Application for claim to be struck out – Ground of no reasonable cause of action – Serious triable issues – Locus standi.

In this case the plaintiff had a public service licence to provide express bus service between Kuantan and Kuala Lumpur. It brought an action alleging that the defendant was illegally providing bus service between Kuantan and Kuala Lumpur without a public service licence and was thereby committing an infringement of the plaintiff's right. The plaintiff claimed an injunction to restrain the defendant from plying for hire between Kuantan and Kuala Lumpur and for damages. The plaintiff applied for interlocutory injunction to restrain defendant from so plying. The defendant on its part applied to have the plaintiff's claim struck out and dismissed on the ground that it discloses no reasonable cause of action, is frivolous and vexatious or is an abuse of the process of the Court and that the plaintiff has no *locus standi.*

Held: (1) the tort for which the defendant would be liable is the tort of interference or disturbance of a right or franchise;

(2) in cases like the present it is not necessary to join the Attorney-General as a party to bring the action;

(3) there are serious issues to be tried in this case and on the evidence the balance of convenience is in favour of the grant of interlocutory injunction. The interlocutory injunction is therefore granted on the undertaking as to damages by the plaintiff;

(4) the defendant's application for the claim of the plaintiff to be struck out must be dismissed as there are serious triable issues in this case and the plaintiff has the *locus standi.*

Cases referred to:

(1) *General Estates Company* v. *Beaver* [1914] 3 K.B. 918.
(2) *Mayor, Alderman and Burgersses of Dorchester* v. *Ensor & Anor.* (1869) 4 L.R. Exch. 335.
(3) *Cowes Urban District Council & Anor.* v. *Southampton, Isle of Wight, and South of England Royal Mail Steam Packet Co. Ltd.* [1905] 2 K.B. 287.
(4) *Dibden* v. *Skirrow* [1908] 1 Ch. 41.
(5) *Iveagh* v. *Martin & Anor.* [1961] 1 Q.B. 232.
(6) *South Johore Omnibus Sdn. Bhd.* v. *Damai Ekspress* [1983] 1 M.L.J. 101.
(7) *Wyld & Ors.* v. *Silver* [1963] 1 Q.B. 169.

A CIVIL SUIT.

Miss U. Ratnasingam for the plaintiff.
N. Chandran for the defendant.

Cur. Adv. Vult.

B **Wan Hamzah S.C.J.**: The plaintiff has been granted a public service licence under the Road Traffic Ordinance 1958 to provide express bus service between Kuantan and Kuala Lumpur. It brings an action alleging that the defendant is illegally providing bus service between Kuantan and Kuala C Lumpur without a public service licence under the Ordinance and is thereby committing an infringement of the plaintiff's right. The plaintiff claims for an order of injunction to restrain the defendant from plying for hire between Kuantan and Kuala Lumpur, and for damages. Soon after filing D the Writ and Statement of Claim the plaintiff by summons-in-chambers dated May 14, 1983 applied for interlocutory injunction to restrain the defendant from plying for hire between Kuantan and Kuala Lumpur.

E According to Mr. Krishnan's affidavit filed in support of the plaintiff's summons, he travelled on defendant's bus No. BBS 1155 on May 8, 1983. The bus left Kuantan at 8.43 a.m. with 36 passengers and pick up two more passengers at Gambang, and arrived at Kuala Lumpur Puduraya Bus Station F at 1.15 p.m. On the same day Mr. Krishnan returned to Kuantan on the defendant's bus No. BBQ 2277 which left Kuala Lumpur Puduraya Bus Station at 3.35 p.m. with 34 passengers and picked up six passengers at Mentakab. Some passengers alighted on the way and the rest arrived at Kuantan G at 8.00 p.m. Mr. Krishnan produced the tickets which he bought for the trips, and also a photograph of the defendant's bus with the route "Kuala Lumpur ke Kuantan" exhibited on its front.

The summons was served on the defendant and H the defendant opposes interlocutory injunction on the following grounds:–

(a) The defendant has been granted public service licence to run bus service between Kuantan and Kuala Lumpur;

I (b) The plaintiff has no cause of action in tort against the defendant;

(c) The plaintiff has no *locus standi* to bring the action against the defendant;

(d) The plaintiff has not alleged that it has suffered any damage.

Several documents were produced to the Court by the plaintiff and the defendants. In the letter (Defendant's Exhibit E) dated July 5, 1978 from Lembaga Pelesenan to the defendant, the heading refers to "bas express diantara Ipoh dan Kuantan melalui Kuala Lumpur", but in the body of the letter it is made clear that the route Ipoh to Kuantan approved to the defendant is *via* Batu Caves. This means that the route does not extend into the heart of Kuala Lumpur Town as far as the Puduraya Bus Station. In the letter (plaintiff's Exhibit YEH 1) dated July 21, 1983 there is a reference in paragraph 2 to the defendant's route Kuala Lumpur – Mentakab. This appears to be a mistake for Mentakab – Kuantan because in paragraph 4 of the same letter it is made clear that three routes only have been given to the defendant and they are: –

Route No. 703 – Kuantan – Mentakab.
Route No. 704 – Kuantan – Ipoh.
Route No. 705 – Kuala Lumpur – Bangi.

The defendant also produced list of its routes for 1981 and 1982 (Exhibits A & B) showing route No. 704 Kuantan – Kuala Lumpur – Ipoh. But in the letter (plaintiff's Exhibit YEH 2) dated February 20, 1984 written by Setiausaha Lembaga Pelesenan in response to the Plaintiff's request for clarification clearly states that in respect of the defendant's route No. 704 the defendant's bus is not allowed to go to Puduraya Bus Station but as far as Batu Caves only, that the defendant is not allowed to pick up passengers at Puduraya Bus Station or drop passengers there, and that along the route Ipoh and Kuantan the defendant is not allowed to pick up or drop passengers at any point. In spite of all these the defendant insists that it was licensed to carry passengers from Kuantan to Kuala Lumpur and *vice versa*. Therefore there is a serious issue to be tried.

As to the cause of action, on behalf of the plaintiff it is contended that the defendant is liable in tort for trespass. In my judgment if the plaintiff's allegations are proved, the tort for which the defendant would be liable is not trespass but the tort of interference or disturbance of a right or franchise. This kind of tort is discussed in *Winfield and Jolowicz* on Tort, Eleventh Edition under the heading of "Miscellaneous Torts." It is discussed in *Street* on Torts, Seventh Edition under the heading of "Miscellaneous Torts" also. There are several decided cases of such tort, and the following case is an example: –

General Estates Company v. *Beaver*[1]

The plaintiff company claimed a declaration that they were entitled to the exclusive right of ferrying foot passengers and their goods across the river Yare from and to all parts of the vills or towns of Gorleston and Little Yarmouth on the other side, or, in the alternative, that they were entitled to two ancient ferries across the river known respectively as the upper and lower ferry; and an injunction restraining the defendant from in any manner disturbing their ferry or ferries by carrying foot passengers and their goods across the river within the limits of their exclusive ferry or near to their ferry or ferries. It was held that such a franchise confers the exclusive right of ferriage throughout the area of the vills. It was further held that, even if the plaintiffs were entitled only to a ferry from point to point, no change of circumstances or new and different traffic had arisen which would justify the defendant in setting up a new ferry in proximity to the plaintiffs' ferry.

The following are also some of the decided cases of actions on tort for the disturbance of franchise or right: *Mayor, Alderman and Burgesses of Dorchester* v. *Ensor & Anor.*,[2] *Cowes Urban District Council & Anor.* v. *Southampton, Isle of Wight, and South of England Royal Mail Steam Packet Co. Ltd.*,[3] *Dibden* v. *Skirrow*[4] and *Iveagh* v. *Martin & Anor.*[5]

Since the Plaintiff in the present case is licensed to operate bus service along the Kuala Lumpur – Kuantan route, it has the right to operate along that route to the exclusion of others who are not so licensed, and any person who operates along that route without licence commits disturbance of the Plaintiff's right.

For the Defendant it was argued that the Plaintiff has no *locus standi* in the matter on the ground that the alleged act of the Defendant, if true, would constitute an offence under the Ordinance for which the Attorney-General would be the proper authority to prosecute. For this contention reliance is placed on the judgment of the High Court at Johor Baru in *South Johor Omnibus Sdn. Bhd.* v. *Damai Ekspres*,[6] in which the facts and judgment are as follows:

"The plaintiffs were a public transport company licensed to operate bus services including the route between Johor Baru and Air Hitam. They brought an action and sought for an interlocutory injunction to restrain the defendant company from operating express bus service between Johor Baru and Air Hitam in excess of two trips per day in contravention of the conditions of the licence granted to them by the Licensing Board. It was held that the remedy sought by the plaintiffs was to prevent a breach of the law which was a public wrong in which only the Attorney-General as Public Prosecutor could sue on behalf of the public, and the plaintiffs' application was dismissed."

I find the facts distinguishable. Whereas in the South Johor Omnibus case the defendant com-

pany was licensed to operate bus service along the route, in the present case the allegation is that the defendant has no licence to operate bus service along the route. In the former case the complaint was that the defendant company operated in excess of the authorised number of trips, whereas in the present case the complaint is that the Defendant is not authorised at all to operate along the route.

In cases like the present case it is not necessary to join the Attorney-General as a party to bring the action. In *Wyld & Ors.* v. *Silver*[7] the facts and judgment are as follows:

"A private Act of Parliament of 1799 recited that the inhabitants of the parish of Wraysbury were, by ancient usage, entitled to hold a fair or wake on the Friday in Whitsun week annually upon a certain part of the waste lands of the parish, and enacted that the commissioners appointed by the Act for the purpose of making an inclosure award should be empowered to appoint a parcel of the waste lands "as near as may be to the place where such fair or "wake hath been most commonly held" for the purpose of holding the fair or wake thereon. It further enacted that the surface of the appointed parcel should not be disturbed.

By their award of 1803 the commissioners allotted three adjoining parcels to named recipients "subject to holding the same annual fair "or wake thereon and for which compensation hath been made." The allotment was followed by a declaration of the future right of the inhabitants to hold the fair or wake as previously and it recited the bar against disturbance of the surface.

One of the three parcels was acquired by the defendant in 1958 with a view to developing it as a building site. The abstract of title made available to him commenced in April, 1900, and contained no reference to the right reserved by the inclosure award. The local planning authority gave outline permission for the erection of five dwellings, and the detailed plans were later approved. By March, 1959, the preparatory work on the site had progressed sufficiently for it to be observed by parishioners.

The plaintiffs, suing on behalf of themselves and other inhabitants of the parish, claimed a declaration that the inhabitants were entitled to hold an annual fair on the plot acquired by the defendant and that the defendant was not entitled to disturb the soil or erect any building on it, an injunction restraining the defendant from disturbing the soil or erecting building, and ordering that he remove all materials and erections placed on the plot."

It was held, *inter alia,*

"(1)that the recitals in the Act of 1799 and award of 1803 were sufficient evidence of the right of the inhabitants to hold an annual fair or wake on the defendant's plot of land;

(2) that the Attorney-General, although a competent party, was not an essential party to the action; and the action was properly constituted as a representative action;

(3) that, since the plaintiffs had shown that the right still existed and that it was vested in the inhabitants, they were entitled to an injunction restraining the defendant from doing any act or thing, or raising any building or structure which would prevent or hinder the carrying on of the fair on his plot."

It is true that the plaintiff does not allege any damage in the Statement of Claim, but in his affidavit dated May 14, 1983 Mr. Yap Eng Hoe, a director of the plaintiff company, alleges damage in paragraph 4 as follows:

"The Defendant Company is infringing the right of the Plaintiff given by the Licensing Board under its licence and is providing illegal express bus service between Kuantan and Kuala Lumpur in direct competition with the Plaintiff's route thereby abstracting (attracting?) passengers and causing undue damage and hardship to the Plaintiff. The Defendant is to the best of my knowledge not issued with any public licence under the Road Traffic Ordinance 1958 to operate the said route."

The case is not being tried yet. At this stage the plaintiff is applying for interlocutory injunction. It is open to the plaintiff at any time before trial to apply to amend the Statement of Claim to include allegation of damage.

I am satisfied that there are serious issues to be tried. I am also satisfied that on the evidence so far adduced the balance of convenience is in favour of the grant of interlocutory injunction. Therefore I grant interlocutory injunction as prayed, on the undertaking given by the plaintiff through counsel that it will pay damages which it ought to pay in the event that the Court would subsequently be of opinion that this order should not be made, and I order that costs should be costs in the cause.

By summons dated June 9, 1983 the defendant applies that the plaintiff's claim be struck out and dismissed on the following grounds:

(i) it discloses no reasonable cause of action;
(ii) it is frivolous and vexatious;
(iii) it is an abuse of the process of court; and
(iv) the plaintiff has no *locus standi* to bring the action.

I have already shown that there are serious triable issues in this case and that the plaintiff has the *locus standi.* Therefore the defendant's summons is dismissed, with costs to the plaintiff.

Order accordingly.

Solicitors: *Sothi & Ang; Adnan Sundra & Low.*